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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 418

THOMAS J. EVANS, JAMES P. TOLIVER, CHARLES W. STOKES and CLARENCE A. LAMBERT, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

[illegible]

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IN THE

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No.

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSIDLE, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on April 21, 1960.

CITATIONS TO OPINIONS BELOW

Opinions of the Court of Quarter Sessions of Dauphin County are reported at 70 Dauphin County Reports 197 and 209, and at 72 Dauphin County Reports 31, and are printed in the Record at 45a, 188a, and 356a.

The opinion of the Superior Court of Pennsylvania is reported at 190 Pa. Superior Ct. 179 (1959), 154 A. 2d 57. The opinion of the Supreme Court of Pennsylvania is printed in Appendix B hereto and reported in — Pa. —, — A. 2d —.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1960 (Appendix B). Time within which to file this petition was extended by a Justice of this Court on July 7, 1960 to September 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), the petitioners having been deprived of due process and equal protection of the laws under the Federal Constitution in their trials by the Commonwealth of Pennsylvania.

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal Questions in this case were raised at each stage of the proceeding by various motions, petitions, objections, and appeals, as follows:

1. Motions and petitions to quash the indictments (12a, 32a, 346a, 351a, 421a, 445a).

2. Motions in arrest of judgment and for new trial (67a, 71a, 111a, 115a, 131a, 135a, 166a, 361a, 385a, 431a, 435a, 460a).

3. During trial by exceptions and motions (throughout the Record).

4. By pleadings on appeal to the Superior Court of Pennsylvania.

5. By petitions for allowance of appeals and briefs on appeal in the Supreme Court of Pennsylvania.

The Federal Questions thus raised were disposed of as follows:

1. Opinion denying motions and petitions to quash the indictments, 45a: No mention of federal issues.

2. Opinion overruling motions in arrest of judgment and for new trial, 188a: No mention of federal issues.

3. Adverse rulings on exceptions and motions during trial.

4. The Superior Court of Pennsylvania found generally that petitioners had "a fair and impartial trial," and that "there was no violation of due process of law." *Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179 at 268. (Petitioner Torrance's conviction on one count was reversed.) Both dissents referred to the abuse of Constitutional rights in detail.

5. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court per curiam adopting the majority opinion therein. *Commonwealth* v. *Evans, et al.*, —Pa. —, — A. 2d —. (App. B)

THE QUESTIONS PRESENTED

I. Whether due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied to petitioners and whether they were deprived of a fair trial by any or all of the following actions of the Commonwealth of Pennsylvania or its duly constituted officers:

a. By the intense publicity and bias generated by the Governor of Pennsylvania by means of personal television appearances which deprived petitioners of a fair trial upon legal indictments returned by an unbiased grand jury?

b. By the intrusion upon the deliberations of the special investigating grand jury by the prosecuting officers who illegally influenced the grand jurors and illegally and erroneously instructed them on the law?

c. By the inclusion of erroneous legal standards in the indictments, which error was compounded by permitting Commonwealth witnesses to read and interpret law to that erroneous effect?

d. By the failure of the district attorney to obtain leave of court to present the indictments to the grand jury, as required by the law of Pennsylvania?

e. By the trial court's refusal to quash the indictments for any one or all of the grounds recited in a to d above?

f. By the trial court's denial of motions for bills of particulars?

g. By the consolidation for trial of conflicting and repugnant charges, resulting in grave prejudice to the defense and confusion to the jury?

h. By the trial court's admission in evidence of the 258 page grand jury transcript of testimony of defendant John D. Paul as an "admission," when it was in fact a document of self-exculpation and a general accusation against petitioners, and which was in fact illegally used by the trial judge, the prosecutor, the jury, and the Pennsylvania appellate courts against petitioners against whom it was inadmissible?

i. [redacted]

j. By the admission in testimony of the 258 page transcript of self-serving grand jury testimony of a co-defendant as an "admission" only against said co-

defendant, without requiring offers of proof, without deleting irrelevant and inflammatory remarks, opinions, conclusions, and questions by both the grand jury witness and the District Attorney, and without striking such portions from the testimony; by the use of that testimony by the trial judge in his instructions to the jury concerning petitioners, use of it by the Commonwealth in argument on appeal, and by the appellate courts against petitioners, all and each of which deprived petitioners of a fair trial and of the right of confrontation of accusers?

k. By the trial court's permitting the prosecution to present and interpret law to the jury by means of witnesses who read and interpreted inapplicable law and practices to the jury, the witnesses being Commonwealth officials, the Deputy Attorney General of Pennsylvania and the Chief Counsel of the Highway Department, and in addition denying petitioners the right to effectively cross-examine these witnesses?

l. By the trial court's forcing petitioner Stickler to produce documentary evidence in the presence of the jury for which the Commonwealth had not subpoenaed him?

m. By the trial court's allowing the prosecution to present five "rebuttal" witnesses who made judicial confessions of their conspiracies and crimes admittedly completely unrelated to the charges against petitioners, which testimony was intended to and did serve only to inflame and prejudice the jury?

n. By the trial of petitioners before a prejudiced and biased trial judge?

o. By the Commonwealth's permitting to stand the convictions of petitioners upon indictments setting

forth *erroneously* certain legal requisites of a public contract supposed by the grand jurors and the trial jurors to be legal requirements of public contracts, when, in fact, such requirements did not exist, which erroneous standards were compounded by the incompetent testimony referred to in k above?

STATUTES INVOLVED

The statutory provisions involved are Sections 652d, 660.2, 660.4 660.5, 660.6, 660.18, 670-102, 670-103, 670-401 *et seq.* They are printed as Appendix A hereto.

STATEMENT

A. TRIALS AND APPEALS

Petitioners were indicted with five others and tried by jury in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for offenses involving conspiracy, false pretenses, and misbehavior in office. Four of the other defendants were acquitted. One was convicted, but discharged by the Superior Court of Pennsylvania on appeal.

Petitioners were convicted of the following offenses:

1. *All petitioners:* of conspiracy to enter a contract between the Pennsylvania Turnpike Commission, a statutory agency of the Commonwealth of Pennsylvania, 36 Penna. Statutes § 652d, as amended, and the Manu-Mine Research and Development Company to provide underground support for the Northeast Extension of the Pennsylvania Turnpike, without fulfilling certain legal requirements.

2. *Thomas J. Evans and James F. Torrance:* of misbehavior in office (as Turnpike Commissioners) by entering into the contract, by permitting it to become effective, and by making payments for its performance (two counts) (Torrance was also convicted on a third count, but this was reversed by the Superior Court).

3. *Charles W. Stickler and Clayton A. Landsidle:* of obtaining money and property by false pretenses. Count 1—obtaining the contract; Counts 2-17—obtaining of contract payments; Counts 18-21—attempts to obtain contract payments; Count 22—attempt to obtain money not paid (Counts 18-21) by lawsuit. Count 22 was dismissed during trial as to Landsidle. The Court imposed these total sentences:

Evans—3 to 4 years; $5500 fine.
Torrance—3 to 4 years; $1500 fine.
Stickler—5 years; $5500 fine; restitution.
Landsidle—1 year, 10 months to 3 years, 11 months; $1500 fine; restitution.

Motions to quash, for bills of particulars, to dismiss, in arrest of judgment, for new trial, were all denied, as were appeals from some of these motions, as detailed later in this statement.

Appeals from the convictions were made to the Superior Court which discharged one defendant from the conspiracy charge and petitioner Torrance from the third count of the misbehavior charge. The court's decision was 4-3. Two of the dissenting judges would have reversed as to all petitioners; the other would have discharged Torrance, granted a new trial to Evans on all charges, and a new trial to Stickler and Landsidle on the conspiracy charge. *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179 (1959).

Petitions for the allowance of appeals were made to the Supreme Court of Pennsylvania on numerous grounds, including the points raised here.[1] However, petitioners Evans, Stickler, and Landsidle were granted appeals only as to one error.[2] Torrance was

[1] See p. 3 et seq., *supra*.

[2] Admission of grand jury transcript of testimony of J. D. Paul, a co-defendant, at the trial.

the only petitioner allowed to appeal generally. In a per curiam opinion dated April 21, 1960, a majority of the court affirmed the order and judgments of the Superior Court, adopting its opinion. Two of the justices concurred with the majority as to Stickler and Landsidle, but dissented as to Evans and Torrance.

B. BACKGROUND OF CASE

The charges arose from the execution and performance of a contract awarded by the Pennsylvania Turnpike Commission to Mann-Mine Research and Development Company to drill access holes through the proposed roadbed of the Northeast Extension of the Pennsylvania Turnpike into abandoned mines and to supervise the flushing of fill through these holes into the mines to eliminate dangerous subsidence of the land over which the highway was to run. (Mann-Mine had performed other work for the Commission in an excellent manner, at fair prices, and no allegation to the contrary has been made.)[3]

Petitioners Evans and Torrance were members of the Commission. Petitioner Stickler was the principal stockholder and President of Mann-Mine, and the nephew of the wife of petitioner Evans. (Richard

[3] Mann-Mine performed these other unchallenged contracts for the Turnpike:

(1) 1951-1956—Elimination of tunnel water seepage (4260r-4270r)

(2) 1953—Study of proposed Northeast Extension routes. (4277r, 4990r, 4992r)

(3) 1954—Estimate of value of coal beneath Northeast Extension. (4290r, 4990r)

(4) 1954—Patrol and aerial survey of proposed Northeast Extension. (4290r-4293r, 5010r)

(5) 1954-55—Engineering studies and planning for Northeast Extension.

Evans, now deceased, a vice-president and stockholder of Manu-Mine, was the son of petitioner Evans.) Petitioner Landsidle was the general manager of Manu-Mine from June 1, 1954. Prior to that he was a project engineer for Manu-Mine.

Under the contract, which was approved and authorized by the Commission on February 28, 1955, Manu-Mine was to lay out the drilling pattern, drill the slushing holes, insert and remove casing in the holes, supervise the erection of brattices underground by others, and supervise the flushing by others. (19e) For this work, Manu-Mine was to be paid $12.50 per foot of drilled hole. (19e) In March 1955, work was begun with a Joy 32T drill which could drill 28 feet per eight hour shift. After about a month the 32T was replaced by a Joy BH58 drill, which could drill about 179 feet per eight hour shift. The latter drill was first brought to Manu-Mine's attention by a new employee, Joseph Speicher, in late February 1955. (3706r)

Work under the contract continued until February 27, 1956, (642r); it was cancelled by the Commission on April 25, 1956. (4703r). Under it Manu Mine was paid $6,721,718 to [illegible]drilling 600,060 feet of access holes, [illegible]sing them, and [illegible]pervising the flushing of the voids. (848r). A portion of the Turnpike Extension was still to be drilled and flushed when the contract was cancelled.

On January 21, 1957, the Turnpike Commission, acting on the advice of its consulting engineer, directed the portion of the turnpike which Manu-Mine had drilled and supervised the flushing to be paved with a permanent concrete surface and that a flexible paving be installed on the unflushed portion because of the danger of subsidence in the unflushed portions. (2044r-2059r; 5017r-5021r)

C. THE INDICTMENTS

Subsequent to the termination of the contract, a Special Grand Jury of investigation in Dauphin County, Pennsylvania, convened on October 22, 1956. This was in the midst of the political campaigns of that year. The matter of Manu-Mine's contract with the Pennsylvania Turnpike Commission was presented to the Grand Jury on the same day, October 22, 1956. That evening Governor George M. Leader appeared on a local (Harrisburg) television program and, referring to the new special grand jury, denounced Manu-Mine and the Turnpike Commission chairman, among others, as perpetrators of a swindle, as people who "set out to steal $20,000,000 from it [the Turnpike], and they got $9,000,000 before we could stop them." (17a; App. C)* His other words and the accompanying film were equally inflammatory. On the following night on a news reporter's panel television show, Governor Leader again broadcast his personal interpretation of the situation and scoffed at the possibility (suggested by a reporter) that his broadcasts could influence the grand jury that had just convened. He blamed the alleged swindle on the Republicans and promised an end to it if Democrats were elected in the coming elections. (19a; App. D)*

On January 18, 1957, following these broadcasts and intensive newspaper coverage, the Special Grand Jury returned presentments against petitioners. These presentments erroneously asserted that the Manu-Mine contract had been entered into without certain legal requirements. These were stated to be competitive bidding, retention by the commission of a percentage

* Transcripts of the broadcasts are in the record as referenced above. Petitioners submit as Appendices C and D the actual tape recordings of the telecasts for the convenience of this Court and to preclude any claim that the portions quoted are out of context.

of payment, a renegotiation clause, and a performance bond. [None of these were legal requirements of Pennsylvania law. *Commonwealth* v. *Evans, et al.*; 190 Pa. Superior Ct. 179, 209.] The District Attorney, without obtaining court approval of the indictments as drawn, presented them to the regular Grand Jury, which returned them as True Bills on January 23, 1957.

During the deliberations of the Special Investigating Grand Jury, the District Attorney and the Special Deputy Attorney General of Pennsylvania intruded upon the Grand Jury and instructed them as to the law. (22a)

Motions and petitions to quash the indictments were denied, and the appeals therefrom were denied by the Superior Court as interlocutory. The Pennsylvania Supreme Court refused to allow appeals.

D. DENIAL OF DUE PROCESS

1. The Indictments.

a. Motions and Petitions to Quash

After the indictments were returned against petitioners, each moved or petitioned to quash them because of the virtual certainty that the presentments and indictments were not the free unbiased acts of the Grand Jurors. (12a, 32a, 33a, 346a, 351a, 421a, 445a) The TV speeches of the Governor on October 22 and 23, 1956, and the unlawful intrusion of the Special Deputy Attorney General and of the District Attorney upon the Grand Jury sessions in January 1957, in which they gave the jury advice that should only have been given by the court, and in such a way that it prejudiced the petitioners. Either ground was sufficient in itself to justify quashing the indictments, but both having occurred, the refusal of the trial court to

grant the motions was clear error and allowed the petitioners to be arraigned in complete disregard of their rights under the Fourteenth Amendment of the Federal Constitution.

Petitioner Torrance's motion asserted the additional grounds that the indictments were defective because they alleged that competitive bidding, performance bond provisions, a 10 percent retention clause and a renegotiation clause were "features prescribed by law," which was false, and because the District Attorney did not obtain the required approval of the court before presenting the indictments to the Regular Grand Jury. Both were unconstitutional denials of due process.

On February 18, 1957, all petitions and motions were denied by the trial court. (44a) In an opinion filed on March 8, 1957, the court explained that he felt that the speech of the Governor did not do "such harm . . . as to require" the quashing of the indictments. (45a at 59a) Much of the opinion was devoted to the defendants' right to use a transcript of the Grand Jury minutes that had been inadvertently filed in the court docket.[4] (This transcript included the improper advice given the Grand Jury and indirect references to other such occurrences on other days. See 22a et seq.) The opinion did not discuss any of the other specific grounds raised. Appeals from his orders were denied.

The motions and petitions had indicated to the court the need for that court to investigate the circumstances

[4] Ironically, during the subsequent trial, the trial judge permitted the prosecution to use secret grand jury testimony, despite repeated defense objections, i.e. the transcript of John D. Paul's grand jury testimony.

surrounding the presentments and the indictments by the two Grand Juries involved. Sufficient uncontroverted grounds were asserted, but the trial court simply ignored its duty to protect petitioners against unfounded accusations and to ensure that the charges emanating from the Grand Jury were determined in an atmosphere of absolute fairness, free from the contamination of political vengeance and ambition.

b. Motions and Petitions for Bills of Particulars.

On May 22, 1957, all motions and petitions for bills of particulars by petitioners were dismissed and overruled without opinion (66a, 356a, 430a, 455a), and petitioners were forced to go to trial on indictments that not only misstated the Pennsylvania law regarding Turnpike contracts, but which were mutually contradictory. The indictments severally charged conspiracy, false pretenses, and misbehavior in office. The false pretense charges presupposed the deceiving of persons allegedly part of the conspiracy and allegedly guilty of misbehavior in office, all indictments bearing, of course, on the same contract and connected events. This point is discussed in the following subsection.

c. Motions for Severance.

Petitioners Stickler, Landsidle, Evans, and Torrance, at the very outset of the trial, objected to the consolidation for trial of the false pretense indictments with the conspiracy indictments, and moved that the Commonwealth be required to elect on which of the indictments it would proceed. The grounds for the motions were evident on the face of the indictments: in the false pretense cases, petitioners Stickler and Landsidle are charged with duping Evans and Torrance, as

Turnpike Commissioners, in obtaining the contract and payment thereunder, while in the conspiracy case, it is charged all of these men and others *conspired together* to defraud the Pennsylvania Turnpike Commission by means of the very same contract and payments. Joinder of the false pretense charges with the misbehavior in office charges produced the additional anomaly that Evans and Torrance as Commissioners were charged with "knowingly, wilfully, and corruptly permitting" a fraud while Stickler and Landsidle under the other indictment were allegedly executing the same fraud by false pretenses.

Thus, the petitioners, after being indicted in an atmosphere of public and political hostility by Grand Jurors who certainly were influenced by the Governor's TV "conviction" and by the "advice" given them by the Deputy Attorney General and the District Attorney, and after being refused bills of particulars, were forced to defend themselves at a mass trial against conflicting and contradictory charges. Their defenses were not only unfairly complicated, but they were certain to be exposed, to their prejudice, to testimony applicable to less than all the defendants that could not be removed, as to them, from the jurors' minds by any limiting instruction. In the seven-week trial, the longest in Dauphin County history (6354r), that ensued, this inevitable result occurred.

The most glaring example of the use of evidence purportedly limited to one defendant that resulted in grave prejudice to petitioners was the admission of the Grand Jury transcript of testimony of John D. Paul, who did not take the stand at the trial, one of the defendants acquitted at the trial. It was characterized

by the Commonwealth as an "admission" or "confession"—258 pages long—of Paul's guilt of the conspiracy charge. (2660r-2918r)

This transcript should have been excluded as not being a confession or admission. This point will be discussed later in this Petition. (See 2a, infra.) Assuming it to be admissible as a confession or admission, it was clearly prejudicial to the other defendants in the false pretense cases because of the joinder. Proof of this is to be found in the Trial Judge's charge to the jury, in which he referred repeatedly to Paul's testimony when discussing the false pretense charges. (6434r-6436r, 6446r-6447r, 6474r-6457r) If the trial judge, who told the jury to apply Paul's testimony only to him (2658r), could not follow that instruction, could the jury?

2. During Trial

The pattern of due process denial that characterized the pre-trial stages of the prosecution marked the trial itself. It became more glaring and more offensive to Petitioners' Constitutional rights. The trial judge and the district attorney combined in disregarding fairness and the rules of evidence and drove the possibility of a fair trial for petitioners out of the courtroom.

a. Admission of the Transcript of Grand Jury Testimony of John D. Paul.

The District Attorney presented and the trial judge admitted, over petitioners' vigorous objections (2649r. et seq.), 258 pages of testimony given by John D. Paul, a defendant and Turnpike employee, before the Grand Jury. The testimony was that of a man trying desperately to exonerate himself and willing to accuse any-

one to avoid accusation against himself.[5] His answers to questions either blackened the petitioners or agreed spinelessly and untruthfully with loaded questions of the District Attorney pointed at the petitioners. No other view can be obtained by anyone reading the transcript. *And this transcript was admitted as a confession or admission by Paul.* It was in fact an accusation.

Petitioners' requests for offers of proof before and during the reading of these 258 pages of self-purification were curtly denied, (2649r et seq) the trial judge even going so far as to declare that he was leaving the relevancy of the testimony to the District Attorney. (2724r)

The District Attorney took full advantage of the trial judge's confidence in him. Under the double-fiction of presenting a "confession" or "admission" only to be considered against Paul, he brought to the jury accusations, insinuations, opinions and hearsay,[6] both

[5] A typical example: "Q. You mentioned this morning that Mr. Evans was interested, you used the word 'interested' in that matter, and you didn't go along with him, he demonstrated his interest, did he not? A. Why, yes, sir, very forcibly, insofar as most things were concerned at least, here is the superior being of the Turnpike Commission, this is a job he wants done, here is the people he wants to employ, that is it." (2728r)

[6] Mr. Justice Bell in a concurring and dissenting opinion in this case, ... Pa. .... (App. B), stated:

"John D. Paul was indicted as one of the conspirators. Paul's testimony before the Grand Jury (. . .) was admitted in this trial and was read in full to the jury under the theory that it was a confession or a so-called admission against interest and was therefore admissible against him. It was certainly not a confession and it is likewise questionable whether it rose to the height of an admission against interest. Paul was acquitted. The vice of Paul's Grand

Jury testimony was two-fold: (1) it contained highly incompetent testimony, hearsay testimony, and his *guesses*, inferences, conjectures and conclusions, and (2) it was *highly prejudicial to Evans*. Paul's testimony was in reality an attempt to incriminate the other defendants, particularly Evans. In order to determine how highly prejudicial to Evans some of Paul's *grossly* incompetent testimony was, I shall quote a few excerpts therefrom:

"'Q. Have you given any consideration to the timeliness of August 25th, 1953, and September 1953, in the light of events that have later occurred?' A. 'Frankly, no, as of this minute I had not.' Q. Does it seem to you *as of this minute* that there is any significance to attach to those two periods of time? A. There might have been. Q. *What might have been?* A. It might have been in somebody's mind; certainly not mine. Q. Well, what might have been in someone's minds that you can think of at this point that *might excite your curiosity?* A. My curiosity now has been developed somewhat by the coincidence, we will call it, of those two dates, insofar as perhaps later activities of Manu-Mine *might have been concerned in somebody's mind*. Q. *What mind are we thinking of* at this moment, sir, that is particularly attractive to your thinking at this moment; what mind would you be attracted to? A. *The only mind* that I would know *that might be at all interested* in Manu-Mine *would be Mr. Evans*, Chairman of the Commission. . . . Q. What would that have possibly entailed if you had given such consideration to those thoughts that would have come through your mind? A. Well, undoubtedly I would have been told that, maybe rather broadly, that it was none of my business, or something like that. Q. In order to convey it to the Grand Jury, we have to do it through what you were thinking. We have to convey it by words, and you have done it very descriptively. Do you think this was a foregone conclusion that Mr. Stickler was going to operate in this field and all you could do was go along with it? A. Well, to what extent Mr. Stickler was received, I think that that was a pretty foregone conclusion that he would get the job. . . . A. . . . and someone besides Mr. Evans, I believe it was Mr. Torrance, and the question was: 'Don't you think we ought to do something about the Department of Mines on this case?' Q. Who made that statement, sir? A. I believe it was Mr. Torrance. . . . Q. What was Mr. Evans' reaction to Mr. Torrance's inquiry? A. 'No, we don't want that.' . . . Q. Mr. Evans did not want the Department of Mines in

this matter, did he? A. No. Q. That was pretty definitely understood by you, was it? A. *I had that impression.* . . . Q. *Why did you conclude* that Mr. Evans didn't want the Department of Mines involved in this? A. Well, actually I don't think I examined *his motive* for thinking so at the time. Q. *Have you since that time examined it?* A. Oh, I thought about it a great deal in the past six or eight months. Q. *What has been the conclusion that your thinking has resolved itself into,* sir? A. Simply this: That the Department of Mines presumably has in its possession or in its record a full supply of maps of all mining work; and that information should be available alone. Now, the question of whether to employ Department of Mines personnel, whether that could be done or not, is quite another story, or was in my mind then. Since then it has, of course, been done, and we employed—I mean the Commission paid for their assisting personnel. So that it no doubt would have been just as possible earlier as it was later. Q. Let's give it a little more validity, sir, to the conclusion, I believe. Isn't this a fact: If the Department of Mines had been consulted it would have done just what it has already done and there wouldn't be any Manu-Mine contract? A. I believe that is a fair statement. Q. In other words, Manu-Mine couldn't have gone into a contract that more than $10 million had been paid on if the Department of Mines had been consulted, *isn't that a fair conclusion?* A. *I think so.* Q. So, therefore, Mr. Evans didn't want the Department of Mines involved in this matter, did he? A. That was clear enough to me. Q. So if the Department of Mines had been involved, Mr. Evans' nephew would not have been involved, is that right? A. I think that is true too. . . . Q. We want to know why, sir. Do you have a reason to ascribe for that? A. The only reason I can ascribe to that is that Mr. Evans might have thought that I would get the contract set up perhaps sooner than Mr. Stone, or something like that; *maybe he had a special purpose in the back of his mind at the time.* Q. *What could that have been?* A. Well, probably another purpose which could have been in the back of his mind was that I was the man who would, say, be duped, put it that way, or, at least, carry out his order to his satisfaction. Q. In other words, or have you now concluded that Mr. Evans did think that he might more easily have you handle the contract of February 28, 1955, than Mr. Roger Stone? A. I would conclude that, yes, sir. Q. There is a reason, isn't there, sir, for most every bit of human conduct? A. Correct. Q

of Paul and of the District Attorney, hostile to the petitioners, which were not subject to objection or cross-examination, because John D. Paul did not take the witness stand and subject himself to cross-examination. None of the petitioners could cross-

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You have ascribed that as a reason, and you have had an opportunity to reflect on it, have you not, sir? A. Yes, sir. Q. That is your considered opinion this afternoon, isn't it? A. Yes, sir, I think so. . . . Q. Did you conclude at that time that Mr. Evans did not want any other drillers in there because there would have been a competitive bidding on that amount of work which would have contrasted to the $12.50 per foot that Manu-Mine was making? A. *At this juncture I would say yes.* Q. Isn't that the reason why no further drillers were brought into that area? Didn't Mr. Evans make it pretty clear to you if any other driller was brought in there there might be a question concerning the $12.50 per foot? A. I would gather that much very clearly, that if anything like competitive bidding was accomplished that that figure might be reduced. That is my opinion; yes, sir. Q. Therefore, you would conclude from that that Mr. Evans gave the instruction to go ahead and drill, and drill regardless of the cost, isn't that right? A. Yes, sir. . . . Q. Other than that, you felt the influence that Mr. Evans exerted was a primary motive behind this contract for renegotiation? A. Yes, there is no doubt about that. Q. And from decision by Mr. Evans you had no redress? Did he have other Commissioners under his thumb, in your opinion, as he had the department heads? A. Mr. Evans as I have said dominated the Commission. He got what he wanted and that refers to the other members of the Commission as well, by one method or another. Somehow whatever he wanted to do the Commission agreed to do.'" [N.B. The dates August 25, 1953 and September, 1953 were insinuated by the prosecutor's questions to show that Paul's promotion to assistant chief engineer in charge of construction coincided with Manu-Mine's initial letter to the commission on August 25, 1953, it being asserted by the prosecutor and corroborated by Paul that he was promoted in September, 1953. (2678r) But Turnpike records showed that Paul's promotion occurred on November 3, 1952. (5096r.)]

examine a transcript or object because it was not to be considered against them.

The joint trial and the misjoinder of charges compounded this gross injustice. The trial ran seven weeks and this transcript was read in the first half of the trial. No attempt was made to set it off from the other evidence applicable to the other eight defendants. Instructions by the judge to the jury to limit its effect to Paul were a mockery of the rule. He cited the transcript as evidence for various aspects of charges against the petitioners, then "cautioned" the jurors that such testimony was applicable only to Paul, a useless bow to petitioners' rights.

An example of such an instruction can be found at pages 6434r-6436r:

> "Joseph E. Speicher was the drilling superintendent of Manu-Mine, and you will recall how he described the drills: One was a light 32 and one was a big BH58. We are speaking from memory. We are not construction engineers. You will recall Speicher said, at least I think he said it, that this big BH58 could drill much more quickly and more deeply in an eight hour shift than the light 32 drill. I will leave that with you jurors to differentiate between the drills. The testimony is Speicher was in charge of the drills, and I believe he is the one that went out and located that big BH58 drill which enabled the Manu-Mine Company to drill much more footage than they would have drilled had they continued to use the one 32 light drill that is mentioned in *the letter of January 6, 1955, which they sent to the Commission—I think to John D. Paul*—saying, "We can drill so much a day'—'25 or 28 feet'—'with the light drill', and *I think Paul's testimony is, as given to the Grand Jury, and applicable to him alone, as we said, that he relied on that.* Then I believe

there is testimony—we leave that to you—that *while that representation was being made, if it was made—that is for you to decide—to Mr. Paul*, that the Manu-Mine Company had already lined up this big BH58 drill. I believe it is the Commonwealth's contention that was an element of deceit. If they knew they were going to use a big BH58, by representing to the Commission that they were going to use a smaller, lighter drill, the Commonwealth's contention is, as I recall it, by knowing that they were going to use a big drill, that they would drill deeper and have more footage, they would make more money at $12.50 a foot, *but they did not tell that to Mr. John D. Paul when they were representing to him what it would cost to drill.* That is up to you members of the jury. I am just giving you my own recollection of the testimony. If I am in error, I am sure counsel will correct me at the end of this charge. Whether he did make that representation or whether he did not, or whether the Manu-Mine Company knew then that they had a B58 lined up or whether they didn't, that is all for you on the matter of credibility." (Emphasis added)

Other references of the same character may be found at 6446r, where the judge after referring to Paul's testimony in discussing the case against Mr. Landsidle and "excluding" it as to Landsidle and Stickler concluded:

> "You must take *all that* into consideration when you pass on the two cases in which Landsidle is a defendant, a defendant in the conspiracy case as well as in the false pretense case." (6448r) (Emphasis added)

Another charge of this nature appears at 6474r.

At 6484r, the trial judge, who commented on each witness in his charge and on the evidence, blandly ad-

mitted, after objections by defense counsel, that he used his "feeble memory" to review the case to the jury and that the jurors should not rely upon his recollection, because he had made numerous misstatements of facts.

In addition to these prejudicial charges, Paul's testimony was used prejudicially against petitioners in the State's argument to the jury, and before the state appellate courts, in the trial court's opinion denying Motions in arrest of judgment and for new trials (216a-220a), and in the opinion of the Superior Court (190 Pa. Superior Ct. 179) which was adopted by the Supreme Court of Pennsylvania in this case.

The evil of the admission of the transcript into testimony was compounded by many factors:

1. The misjoinder of offenses,
2. Denial of bills of particulars,
3. Refusal to require offers of proof,
4. Lack of copies of transcript at trial (only Paul's counsel had a copy).
5. Inclusion of numerous conclusions, opinions, and insinuations of the District Attorney and the Deputy Attorney General in the transcript,
6. Inclusion of completely irrelevant but prejudicial opinions, thoughts, and suppositions of Paul as to the thoughts and motives of others,
7. *Denial, by use of this transcript, of petitioners' rights to due process, to confront accusers, and to cross-examine witnesses against them.*

b. Admission of Testimony As to the Law of Pennsylvania

In still two other instances the trial judge gave free rein to the prosecutor and in effect let him use two witnesses to exercise the primary function of the judge himself: the presentation and interpretation of the law to the jury.

Harrington Adams, the Deputy Attorney General of Pennsylvania, took the stand to read portions of the Pennsylvania statutes pertaining to the Turnpike Commission (Turnpike Act, as amended, 36 P. S. 650.1 et seq.) portions carefully selected by the prosecutor (391r-415r). To the jury the witness appeared as a spokesman for the Commonwealth. The laws he read applied to "construction" contracts, in support of the Commonwealth contention that a "construction" contract and not an "engineering" contract (not subject to bidding, etc.) was involved. This Court warned against the danger of such a witness in *Ennis* v. *Smith*, 14 How. 400, 426.

The trial judge's admission of this testimony was rendered even more prejudicial when, despite persistent defense requests, he refused to rule whether the contract was one for construction or not. Indeed, he left this question of law expressly to the decision of the jury. (6414-20r)

Having been permitted to load the case in this way against petitioners, the District Attorney, without hindrance from the judge, went one step further with his next witness, John R. Rezzolla, Jr., Chief Counsel of the Pennsylvania Department of Highways. Rezzolla did not just read and interpret statutes to the jury (437r); the statutes he discoursed upon were expressly inapplicable to the Turnpike. He read the *Highway Department Act (Act No. 428, 36 P.S. 670.101-670.1402)*, and then explained Highway De-

partment procedure thereunder but he expressly failed to read or explain the following portion (36 P.S. § 670-103) of said act.

> "This Act does not include any provisions of, and shall not be construed to repeal:
>
> * * * * *
>
> "(4) Any law administered by the Pennsylvania Turnpike Commission . . . ."

The Turnpike Act contains no provisions for competitive bidding or bonds in letting contracts. Under it the Commission has full discretion in awarding contracts, subject only to obtaining the approval of the Department of Highways for construction contracts. If it was a construction contract, approval of the contract in controversy was given by Joseph J. Lawler, Secretary of Highways, when he voted for the contract as an *ex officio* member of the Turnpike Commission (604r-607r). That the contract bidding and bond requirements were inapplicable to the Turnpike Commission at the time in question was confirmed by Superior Court in this case. 190 Pa. Superior Ct. 179, 209.

In permitting Adams and Rezzolla to testify, the trial judge allowed the prosecutor to take over the trial and to present to the jury law and an interpretation thereof that was inapplicable to the case. What law was presented was incomplete and viciously misleading. What the District Attorney did was tailor the Pennsylvania law to his theory of the case, and, with the outrageous acquiescence of the judge, lead the jury to believe that this was the law of the Commonwealth squarely applicable to the charges against petitioner. Why is a judge on a bench, if he is not there as the authority on the law, and to see that law is correctly applied to the persons on trial?

c. Court Ordered Petitioner Stickler in Front of Jury to Produce Business Records

The Commonwealth had subpoenaed Clyde J. Siegfried, the Manu-Mine Controller, to appear and bring with him certain Manu-Mine business records. (2931r) At that time these were in the possession of Mr. Stickler, so Siegfried was unable to produce them. (2932r) Stickler was not subpoenaed to produce them. The trial judge ordered Mr. Stickler to produce these documents immediately in the court before the jury, refusing to require the Commonwealth to give notice or to make an offer of proof and to specify or describe the documents desired, except as they were set out in the Siegfried subpoenas. The rights of the petitioner were called to the judge's attention, but he refused to consider them. All of this took place in front of the jury. (2931-6r)

d. Introduction of Evidence of Conspiracies and Frauds Completely Unrelated to the Charges and the Petitioners

Petitioner Stickler on cross-examination denied that his firm Manu-Mine was able to find proof of certain alleged wrongdoings by employees who supervised the slushing operations. (4709r-4710r) Defense witness Luke, a Manu-Mine employee, also stated he had no knowledge of such wrongdoing. (3291r)

In rebuttal, the prosecution put five ex-Manu-Mine inspectors on the stand. (5796r et seq) These men made judicial confessions of conspiring with George D. Oswald [7] of Rogers Brothers Construction Company to issue false weight slips for till that was never deliv-

[7] A prosecution witness who testified about slushing. He did not mention his own crimes, and petitioners, being without knowledge of them, could not impeach him.

ered. None of the witnesses attributed any knowledge of the crimes to Stickler or Luke, and all admitted affirmatively concealing the crimes from Manu-Mine. (5834r, 5843r, 5864r, 5874r, 5894r, 5900r)

This evidence was a clear violation of the rule prohibiting evidence of unrelated crimes. It is a forceful demonstration of the purpose of that rule. It served, as the prosecution intended, to anger and prejudice the jurors.

REASONS FOR GRANTING THE WRIT

It is a well-known and honored principle of this Court that in reviewing cases from the courts of the States, it does not invade a State's sovereignty by prescribing the procedures that States must use to afford due process of its citizens. Particular cases are examined for the existence of due process. If this Court finds that due process is lacking, it indicates this defect and directs the State to correct it. Concisely, the United States Supreme Court guides the States in the area of the Fourteenth Amendment, whereas it supervises the administration of Criminal Justice in the Federal Courts in the due process area of the Fifth Amendment. See *Brown* v. *Mississippi*, 297 U.S. 278. See also *Elkins and Clark* v. *United States*, No. 126, October Term, 1959, — U.S. —, 28 Law Week 4567, in which this Court ruled inadmissible in a federal court evidence obtained in violation of the Fourteenth Amendment.

Accordingly, petitioners here are not attacking the processes of justice of the Commonwealth of Pennsylvania. They are asserting that in the specific circumstances here they were denied due process, that several errors of omission and commission were made by the

Commonwealth of Pennsylvania through its Governor, its prosecutors, and its courts, which individually and collectively denied petitioners the sacred protection of the Fourteenth Amendment to the Federal Constitution.

Some of the errors that robbed petitioners of these rights are so unusual, so unprecedented that only the intervention of this Court can correct them, can prevent them from achieving a status of legality under the law of Pennsylvania, and eventually under the laws of other States. Petitioners believe that the denial of their rights was so offensive to the Constitution that that alone will merit this Court's attention, *but, with conviction*, petitioners believe that extremely important Constitutional questions are involved that demand the decision of this Court to preserve fair trials in the Commonwealth of Pennsylvania and in her sister States.

Chronologically, the errors which denied due process to the petitioners were:

1. On the very day of, and the day following, the assignment of this case to an Investigating Grand Jury, the Governor of the Commonwealth appeared on two television programs and told the people of Pennsylvania by word and picture that petitioners were irrefutably guilty of stealing from the Commonwealth. This was preceded and succeeded by intense newspaper publicity.

2. Fictitious "legal" requirements for the contract involved were written into the presentment of the Investigating Grand Jury and preserved in the indictments by the District Attorney's failure to obtain court approval of the indictments as drawn before submis-

sion to the regular Grand Jury, and the error was compounded by the prejudicial erroneous testimony of Commonwealth witnesses. See No. 8, *infra*.

3. The District Attorney and the Special Deputy Attorney General intruded upon the deliberations of the Special Investigating Grand Jury and in addition instructed that jury on the law, and otherwise influenced it contrary to the laws of Pennsylvania.

4. Motions to quash the indictments and subsequent motions for bills of particulars were denied, and appeal at that time was also denied. (These motions were based on the errors cited above, among others.)

5. Trials of nine defendants on three different and conflicting charges, some involving 22 counts, were consolidated.

6. The trial court allowed the Commonwealth to read in evidence the transcript of grand jury testimony of Paul, a co-defendant, as an "admission" only against him, which testimony was exculpatory of himself, accusatory of petitioners, and inflaming to the jury.

7. Both the trial judge in his charge and the prosecutor in his argument used Paul's testimony against one or another of the petitioners. The trial court used it illegally again in denying a new trial, as did the Superior Court of Pennsylvania, in the majority opinion.

8. Witnesses, high officials of the Commonwealth, were used to present and interpret state law to the jury, and petitioners were denied their right to effective cross-examination.

9. The trial judge forced petitioner Stickler in front of the jury to produce his company's business records for which the Commonwealth had subpoenaed the wrong person.

10. The trial judge allowed the Commonwealth to present witnesses to the jury who testified about their own crimes and conspiracies which had no connection with the charges in the case.

11. Besides the bias shown in the course of the trial judge's errors enumerated above, his general treatment of petitioners and defense counsel demonstrated his prejudice against them and the impossibility of a fair trial.

1. The Governor's Television Broadcasts

An article in the August 1960 issue of The American Bar Association Journal by Justice William O. Douglas, *The Public Trial and the Free Press*, pinpointed the prejudicial effectiveness of television.

> "... The television trial may produce evidence to convict the witness; and *it may so saturate the country with prejudice against an accused that a fair trial may be next to impossible....*" (Emphasis added)

Mr. Justice Douglas was considering specifically the televising of Congressional hearings, but what he said can be applied with equal truth to a Governor's televised presentation of his views of a criminal case. In this case, Governor Leader unequivocally convicted petitioners of stealing $9,000,000 from the Commonwealth and attempting to steal $11,000,000 more. He insinuated that he relied upon "a great body of information," that he had "only scratched the surface," that the Grand Jury would reach "a logical decision." (17a, 19a, App. C, D)

Had the Governor gone before the Grand Jury in person, he could not have more effectively controlled the result reached by that body in recommending the

indictment of the petitioners. Its eventual decision became a foregone conclusion. The Governor had issued a mandate to indict.

What fair trial was possible after such a beginning? The Governor's telecasts amounted to a promise that the Pennsylvania juries and courts would indict and convict petitioners. And these telecasts were merely the main eruptions of a continuous glare of publicity, including coverage in a national magazine.[5]

So unusual was the Governor's action that petitioners are unable to find a case of similar activity by such a high official. In *Shepherd* v. *Florida*, 341 U.S. 50,[6] newspapers reported that the sheriff stated that the defendants had confessed. No confession was produced at trial. In an opinion concurring in the result, Mr. Justice Jackson called the trial "but a legal gesture to register a verdict already dictated by the press and the public opinion it generated." Id. at 51. If the press is prohibited from dictating a verdict, where does a Governor using a media of mass communication stand?

A closer analogy occurred in *Delaney* v. *United States*, 199 F.2d 107, (C.A. 1) In that case a congressional investigating committee caused intense publicity, on television, in newspapers, and in a national magazine in investigating the circumstances connected with charges of bribe taking and making false certificates against an Internal Revenue Service official. The indictments there occurred prior to the committee's

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[5] *Saturday Evening Post*, June 28, 1958.

[6] Reversed per curiam for exclusion of Negroes from the grand jury.

investigation. Denial of a third continuance because of the publicity was appealed and reversed by the First Circuit Court of Appeals because of the unlikelihood of a fair trial and especially because the Government was itself responsible for the publicity. *United States* v. *Florio*, 13 F.R.D. 296 (D.C., S.D.N.Y. 1952), reached the same result in a similar case citing Delaney and finding no distinction therefrom because the publicity had been generated by a New York state agency. *United States* v. *Dioguardi*, 147 F. Supp. 421 (D.C., S.D.N.Y.), a case connected with the blinding of Victor Riesel, was continued because of intense publicity in a connected trial.

Petitioners here did not move for continuance. They moved to quash on this ground and the Trial Court's denial of the motion, stating that the Governor's speeches did not do "such harm . . . as to require" the quashing of the indictments (59a) showed petitioners the hopelessness of moving for a continuance.

No grand jury having been so dramatically made aware of their Governor's views could be unbiased.

Costello v. *United States*, 350 U.S. 359, at 363, states the Constitutional requirement for indictments: "An indictment returned by a legally constituted and *unbiased* grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits." (Emphasis added.)

In *Ciucci* v. *Illinois*, 356 U.S. 571, 573, Mr. Justice Harlan and Mr. Justice Frankfurter, concurring with the majority in the 5-4 affirmation of a conviction, indicated they would have considered the possibility of newspaper articles creating "fundamental unfairness," had the issue been raised below. In that case,

the defendant killed his wife and three children, but was tried separately for each. The first trial resulted in a twenty-year sentence, and the second in a forty-five year sentence. Following the second trial Chicago newspapers carried articles "attributing to the prosecution certain statements expressing extreme dissatisfaction with the prison sentences fixed by the jury and announcing a determined purpose to prosecute petitioner until a death sentence was obtained." The third trial drew a death verdict. See also *Coppedge* v. *United States*, 272 F.2d 504 (C.A.D.C., citing *Marshall* v. *United States*, 360 U.S. 310, and see also *United States* v. *Powell*, 171 F. Supp. 202 (D.C., N.D. Calif. SD).

2. Fictitious "Legal" Requirements

The indictments against petitioners stated that certain "legal" requirements, i.e., competitive bidding, retention of fixed percentages, performance bond, negotiation clause, were omitted from the contract that is the backbone of this case. The Superior Court expressly held (*Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179, 200), that the Turnpike Commission statute did not require these things and that court further assumed, at page 200, that they were not "legal" requirements. The Superior Court, whose opinion was adopted by the Pennsylvania Supreme Court, found that the controversial wording of the indictments was surplusage, that these factors were a "usual practice" of the Commission and sufficient in that sense in order to support convictions under the indictments. Evidence at the trial left this point in such uncertainty that the trial judge left it to the jury as a question of fact, i.e., whether these were legal requirements of a Turnpike contract (an error in it-

self), but, assuming it to be correct *arguendo*, it deprived petitioners of due process because it permitted conviction upon a charge not made. The indictment uses the words "required" and "legal" repeatedly, words which can have no other connotation but to indicate that the law expressly provided certain requirements. Otherwise, petitioners were tried for a failure to observe an unsanctioned practice or custom. The result is that they were convicted on charges not made, that an element of the charged offenses was ruled surplusage.

The controlling principle here is that of *Cole* v. *Arkansas*, 333 U.S. 196, in which the defendants were convicted of assembling unlawfully to prevent workers from working. Their convictions were affirmed under another law prohibiting the prevention of workers from working by means of force or violence. This court reversed, holding that the State Supreme Court's decision amounted to a conviction without trial or notice. In *Thornhill* v. *Alabama*, 310 U.S. 88, this Court stated, "'Conviction upon a charge not made would be a sheer denial of due process.' *De Jonge* v. *Oregon*, 299 U.S. 353, 362; *Stromberg* v. *California*, 283 U.S. 359, 367."

3. Intrusions Upon the Special Investigating Grand Jury. Unlawful Instructions to the Special Investigating Grand Jury on the Law.

Under Pennsylvania case law the prosecutor's duties in relation to a grand jury are clearly delineated. He is to aid in the examination of witnesses, give such general instructions as may be required, "but he must not attempt to influence their action nor indeed should he be present while they are deliberating on the evidence or voting on a matter under investigation." *Common-*

wealth v. *Bradley*, 126 Pa. 199, 205 (1889); *Commonwealth* v. *Brownmiller*, 141 Pa. Superior Ct. 107, 113 (1940); *Commonwealth* v. *Judge Smart*, 368 Pa. 630 (1951). That the court gives the grand jury the applicable law was a rule concretized early in Pennsylvania law by *Commonwealth* v. *Crans*, 2 Clark 162; 3 Pa. L.J. 442 (1844).

Thus, regular Pennsylvania procedure was not followed by the prosecutors in this case. They both intruded upon the deliberations of the grand jury, *and* usurped the court's function by advising the grand jury on the law. See the following subsection). Once again petitioners were denied due process and equal protection of the laws.

4. Denial of Pretrial Motions.

Due process of law was denied to petitioners by each of the errors discussed in 1, 2 and 3 above. To obtain relief from this denial, petitioners made pretrial motions to quash and for bills of particulars citing as the basis therefor the denial of their Constitutional right to have their alleged offenses investigated by an unbiased grand jury. *Costello* v. *United States*, *supra*. The motions were severally denied. In denying the motions to quash, the trial court wrote an opinion. (45a) This opinion characterized the intrusion upon the grand jury as the giving of instruction and advice upon the grand jury's request (51a), stating the court could not do so "without violating the secrecy of the proceedings." (51a) If the court would have violated the secrecy of these proceedings, how is it that the prosecutors did not? Furthermore, this opinion paradoxically admits that the prosecutors instructed the grand jury on the law, stating that "these officials" in

"answering certain inquiries of the Grand Jury *concerning some legal aspects of the case*," gave answers based on hypothetical facts. (49a-50a)

Admitting that the Governor's speeches had a "highly political flavor," the court nonetheless found that there was no "reason to believe" that the grand jury was biased by it. But the motions had requested the court to "inquire into the circumstances and the character of the speeches, as well as the actions of the District Attorney and the Special Deputy Attorney General, in deciding the motions. This the court failed to do, despite the obvious evidence of the harmful effect of these circumsances.

Another ground for quashing the indictments lay in the fact that the District Attorney presented the indictments to the indicting grand jury without obtaining "leave of court," that is, approval of the proposed indictments. That such procedure is required under Pennsylvania law is stated in *Commonwealth* v. *Wilson*, 134 Pa. Superior Ct. 222 (1938), which ruled in a case also involving alleged corruption in office and also involving a special and a regular grand jury as here, that leave of court must be obtained before a district attorney could present an indictment or witnesses pertaining thereto to the regular grand jury.

By denying the motions to quash, the trial court again denied to petitioners due process of law and the equal protection of the laws.

5. The Consolidation for Trial

Petitioners objected to the Commonwealth's motion to consolidate the charges for trial, but the trial court overruled the objection. All four petitioners with five other defendants were tried for the conspiracy although

the proof varied as to individuals because of varying individual facts. In addition, petitioners Evans and Torrance were tried for misbehavior in office despite the fact that much of the evidence connected with the conspiracy related to periods of time *after* they were out of office. Finally, petitioners Stickler and Landsidle were tried on the false pretense charges, which not only added to the confusing jumble of evidence presented to the jury, but which indictments were repugnant on their facts to the conspiracy charges. The false pretense indictment (Count 1) alleged that *by use of false pretense* petitioners Stickler and Landsidle "unlawfully and feloniously obtained the signatures of T. J. Evans, James F. Torrance, and Theodore S. Paul of the Turnpike Commission," all of whom were alleged in the conspiracy indictment and tried as co-conspirators. There is no doubt that both alleged offenses could be said to arise from the same circumstances, but it defies logic and a man's ability to defend himself to accuse a man on one hand of conspiring to do an unlawful act, and on the other to accuse him of getting his co-conspirators to do it by fraud and false pretense.

The remaining twenty-one counts allege the false pretense (to obtain contract payments) as made against the Turnpike Commission, not alleging names of members, but two of the Commission members and several Commission employees (for most of the period involved) were alleged co-conspirators.

Such a joinder in and of itself deprived petitioners of a fair trial. The conspiracy was repugnant to the false pretense charges and vice versa. And the false pretense was also repugnant to the misbehavior in office charges, in that it charges Evans and Torrance

with "knowingly, wilfully and corruptly" doing what Stickler and Landsidle are accused of tricking them into doing.

McElroy v. *United States*, 164 U.S. 76, at 80, states the general rule on joinder: ". . . joinder cannot be sustained where the *parties are not the same* and where the offenses are in nowise parts of the same transaction and *must depend upon the evidence of a different state of facts* as to each or some of them." (Emphasis added)

The Pennsylvania cases support this rule, leaving the decision to the trial court's discretion. Abuse of this discretion is ground for reversal. *Commonwealth* v. *Mulroy*, 154 Pa. Superior 410; *Commonwealth* v. *Dixon*, 179 Pa. Superior 1.

That the trial judge in this case clearly abused his discretion is evident from the facts set out above and from the record of the seven week trial in which multitudinous evidence was presented which applied to some or one defendant only or to some or one charge only. The most glaring examples of this were the Grand Jury transcript admitted only against John D. Paul (see subsection 6 and 7, infra) and the rebuttal witnesses who testified about their own crimes allegedly to rebut the testimony of one defendant and one defense witness as to one point (see subsection 8, *infra*).

6. Admission of Grand Jury Transcript

Over petitioners' repeated objections and refusing their requests for offers of proof and deletion of prejudicial portions, the trial court allowed the Commonwealth to have the 258 pages of grand jury testimony of John D. Paul, a co-defendant in the conspiracy case, read to the jury. The nature of this alleged "admis-

sion" and its harmful effects were discussed above at p. 15 et seq.

Paoli v. *United States*, 352 U.S. 232, although dealing with a federal case, sets forth standards of fairness that should be applied in appraising the due process aspects of the admission of this evidence. First of all an admission by one co-defendant after the termination of a conspiracy is inadmissible against his co-defendants and the judge must instruct the jury accordingly, 352 U.S. at 237. But other factors caused this Court to approve the admission in the *Paoli* case. The facts of the conspiracy were simple and easily understood by the jury; the evidence of guilt *aliunde* the confession was sufficient to convict. There was no indication of jury confusion; it was not a mass trial; there was no multiplicity of evidentiary restrictions, 352 U.S. at 241-2.

In this case the alleged facts of conspiracy were complicated; that the evidence *aliunde* the admission was sufficient is questionable. The jury was confused as may be deduced from the fact they acquitted Paul who was the only defendant who had made "admissions"; it was a mass trial; and there was a multiplicity of evidentiary restrictions because of the varied defendants, charges, and evidence.

Moreover, only Paul's counsel was given a copy of the transcript and then only a few pages at a time. The trial judge refused to screen the transcript in advance to protect the co-defendants. Finally, the trial judge vitiated whatever limiting instructions he gave to the jury by repeated illegal use of that testimony against other defendants in his charge. Compare this with the trial court's handling of a 42-page grand jury transcript in *United States* v. *Baudo*, 244 F. 2d 833

(C.A. 2); cert. den. 355 U.S. 844, in which it was held error to admit the transcript without deleting the co-defendant's name. The error was held harmless because of *other conclusive proof of guilt* and because of an adequate jury instruction. It is noteworthy that the trial court in that case had the transcript read into the record in the absence of the jury before it was read in open court and that all defense counsel were provided with photostatic copies in advance.

The Commonwealth's only purpose in offering the transcript testimony was to deprive the other defendants of a fair trial. The prosecutors knew full well that it would exonerate Paul and prejudice petitioners who would have no way to confront Paul's accusations. The jury proved this by acquitting Paul.

7. Use of Paul's Transcript Testimony Against Petitioners

The effect of Paul's Grand Jury testimony on the trial jury need not be left to pure conjecture. In a concurring and dissenting opinion in the Superior Court in this case, Judge Woodside analyzed it accurately:

> "... The question here is whether the jury used this testimony to the prejudice of appellants. We start with the presumption that it did not, because the trial judge told it not to. But, as I see it, this is a presumption which circumstances can rebut, and the use of this testimony throughout the proceedings by both the *trial court and the Commonwealth*, overcomes the presumption that *the jury* did not use it against the appellants.
>
> * * * * *
>
> "To emphasize how impossible it was for the jury to follow the court's instruction not to use this testimony, we need only note that the court

> itself in its opinion used over 700 words to review Paul's testimony. . . . Even in the argument before this Court, the District Attorney made extensive use of Paul's grand jury testimony to support the convictions of appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to determine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt."
>
> *Commonwealth v. Evans, et al.*, 190 Pa. Superior Ct. 179, at 278.

Judge Woodside was referring in the second paragraph above to events occurring *after Paul's acquittal*, i.e., on Motion for new trial, and on appeal.

And the majority opinion of the Superior Court fell victim to the same temptation. It relied on Paul's testimony to affirm the convictions of petitioners because, as dissenting Judge Watkins in that Court said, ". . . *without this testimony there remains no set of circumstances from which an inference of guilt can arise.*" 190 Pa. Superior Ct. 179, at 309.

8. Reading and Interpretation of Law by Commonwealth Witnesses

The primary function of the judge in a jury trial is to attend to the law of the case, to instruct the jury accurately on the applicable law. Under Pennsylvania cases and probably in all jurisdictions, the judge is to instruct the jury on the law, *Schofield Discipline Case*, 362 Pa. 201, and it is error to permit witnesses to interpret the law, *Commonwealth v. Giltinan*, 64 Pa. 100. Even counsel in Pennsylvania have no right to read law to the jury in argument, it being within the court's

discretion to permit it. *Commonwealth* v. *Rongo*, 216 Pa. 147, 65 A 30, approved this discretion, but criticized the practice. That witnesses are incompetent to testify concerning statutes is the general rule. See *State* v. *Claiborne*, 185 Iowa 170, 170 N.W. 417; *McLendon* v. *Columbia*, 101 S.C. 48, 85 S.E. 234; and *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 2021, 88 S.W. 2d 1007. No cases to the contrary were found.

The departure of the trial court in this case was gravely detrimental to petitioners' chance for a fair trial and their right to have the *correct* law and interpretation presented to the jury by an impartial judge. And it was not a simple departure from the rule. The witnesses were the Deputy Attorney General of Pennsylvania and the Pennsylvania Highway Department Chief Counsel. The first read some statutes applicable to the Turnpike Commission *and interpreted them*. The latter read Highway Department statutes (held inapplicable by the Superior Court in this case) *and interpreted them* and also testified about *Highway Department application of these immaterial statutes*. Petitioners' objections were all overruled, including renewals at the end of the trial.

This procedure deprived petitioners of a fair trial, of due process, and of the equal protection of the laws of Pennsylvania, by depriving them of judicial supervision of their trial, and by causing them to be tried on laws not involved in the case.

9. Compulsory Production of Evidence

The trial court ordered petitioner Stickler to produce certain Mann-Mine business records in front of the jury. After the Commonwealth had discovered that Clyde J. Siegfried, a Commonwealth witness then

on the stand, whom it had subpoenaed for them, did not have them at the time of the subpoena. Outrageously ignoring the Federal and Commonwealth constitutional guarantees against self-incrimination, the trial judge required petitioner Stickler, in full view and hearing of the jury, to comply with the subpoena which had been directed to Siegfried. Similar action was the basis for a new trial in *Commonwealth* v. *Valeroso*, 273 Pa. 213, 116 A 828.

The Superior Court in this case acknowledged that *Valeroso* is the authority in Pennsylvania on this question. But that court attempted to vitiate the force of that case by citing other cases which hold that the "custodian" of corporate records may not withhold them because he might be personally incriminated. That court overlooked the fact that in this case (1) no subpoena to Stickler had issued, (2) that Stickler was a defendant on trial, and (3) that the demand and order was made without notice in front of the jury. This situation differed importantly from the facts in the cases cited by the Superior Court. *Curcio* v. *United States*, 354 U.S. 118, involved a union officer subpoenaed to testify and produce union records before a special grand jury. He refused to testify or to produce the records. His privilege as to testimony was upheld, but this Court ruled he must produce the papers since the Corporation (union) had no privilege. But he was (1) a witness, not a defendant, (2) who had been *subpoenaed duces tecum*, and (3) the demand was not before a trial jury called to decide his guilt or innocence of a crime.

The evil that is complained of here is well described in the Annotation, *Calling upon accused in the pres-*

ence of jury to produce document, etc., 110 A.L.R. 101 at 102, quoting *Commonwealth* v. *Valeroso*, *supra*:

> "If there be a missing link in the Commonwealth's case, what more damning circumstance could there be to the defendant, to whose possession it is alleged to have been traced, than his standing mute under call?"

The annotation continues:

> "For the prosecuting officer, in the presence of the jury, to call upon the accused to produce an original writing, as in his possession, is to place him in a position before the jury where his action will be tantamount to giving, under compulsion, incriminating evidence against himself; for the accused must, in answer to the call, either produce the document or explain its nonproduction, or maintain a silence highly prejudicial to his case. *Com.* v. *Hubbard* (1916) 65 Pa. Super. Ct. 213."

Thus, petitioner Stickler was deprived of his constitutional rights in particular, and his fellow petitioners burdened by yet another cause of general prejudice against them.

10. Admission of Testimony of Crimes and Conspiracies of Others

In *Lisenba* v. *California*, 314 U.S. 219, at 236, a State criminal case, this Court pointed out, "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." The trial against these petitioners produced several violations of this rule, some more direct than others, notably Paul's grand jury testimony. But an equally unfair tactic was employed by the Commonwealth when

it presented five "rebuttal" witnesses, the gist of whose testimony was that they were employees of Manu-Mine and that they had committed crimes entirely distinct from those in this case, and entirely without the knowledge of any defendant. Their evidence was true, but served only to nail the coffin-lid on petitioners' hopes for a fair trial. The Commonwealth prosecutors used these witnesses to bias the jury, hoping that their anger and disgust with these *confessed criminals* would find an outlet against petitioners.

Permitting these witnesses to testify was contrary to the general rule prevailing throughout this Country that evidence of other and distinct offenses are inadmissible in a criminal prosecution. *Faust* v. *United States*, 163 U.S. 452. Such is the rule in Pennsylvania. *Commonwealth* v. *Bardolph*, 326 Pa. 513.

The prosecution asked petitioner Stickler and defense witness Luke, a Manu-Mine engineer, whether they knew of any wrong-doing connected with the supplying of fill for the mine cavities. Both stated *they had no knowledge* of any such crime. Under Pennsylvania law, it is not permitted to attack the credibility of a witness on matters in which his answer amounts to "I don't know." *Commonwealth* v. *Kettering*, 180 Pa. Superior Ct. 247, 119 A 2d 580. Furthermore, the same rule against attacking credibility is applied when the testimony involves collateral matters. *Commonwealth* v. *Petrillo*, 341 Pa. 209, 19 A. 2d 288; *Zubrod* v. *Kuhn*, 357 Pa. 200. In the trial of petitioners the prosecution violated both rules, since the witnesses declared ignorance of facts of a collateral matter.

As in so many other matters already discussed, it becomes clear that the Commonwealth, determined to convict petitioners, used unconscionable means at every

opportunity, that it was not even reluctant to violate its own fundamental evidence rules, which protect all citizens of Pennsylvania, except Petitioners.

11. The Bias of the Trial Judge

The preceding discussion has given some indication that the trial judge was less than impartial in his handling of important evidentiary questions. His rulings reflected his general attitude toward petitioners during the trial.

His attitude was especially unfair toward petitioners' requests for offers of proof. Such requests had to be made because of the number of defendants and charges involved so that it might be made clear what defendants and what charges were involved with particular Commonwealth testimony and evidence, to exclude incompetent and irrelevant testimony, and to eliminate the necessity for numerous defense objections. But the trial judge abused the discretion vested in him and hampered the defense, while toward the prosecution he exhibited the unusual solicitude of requiring, on his own motion, an offer of proof for a defense witness. (5404r-5446r)

The trial judge refused defense requests for offers of proof for these 15 witnesses:

Lawler 567r, 576r, 580r-583r
Summers 810r, 810r-812r
Guldin 1493r
LaManna 1656r, 1658r, 1706r, 1712r-1714r
Connelly 1759r, 1782r
Beaney 1995r
Lambert 2013r, 2129r
Kudlich 2190r, 2202r, 2216r

Pierce 2315r
Corey 2561r
Wallower 2647r, 2566r, 2723r-2725r
Martin 2592r, 2593r
Stuart 2925r
Siegfried 2934r, 2940r-2942r, 3013r
Oswald 3025r, 3034r, 3037r

By his arbitrary refusals, the trial judge deprived petitioners of the usual protections afforded by the Pennsylvania rules of evidence under *McClellan* v. *Lindsay*, 1 WNC 350, 362; *Morgan, et al.* v. *Brown*, 71 Pa. 130, 136; and *Rogers, Adm.* v. *Fleming*, 325 Pa. 228, 233.

The bias of the trial judge appeared also in his treatment of objections by the defense (837r, 2349r, 2356r, 3418r, 3942r, 4455r, 4906r, 5190r), in his discrimination in the scope of defense examination of witnesses (696r, 1178r, 1179r, 3246r-3254r), in his sarcasm (3315r-3316r, 3345r, 3984r, 4424r), and in his charge to the jury (6421r, 6421r, 6435r, 6438r).

These examples of the attitude of the trial judge coupled with his rulings on the various phases of evidence, made it very clear to petitioners that he was aligned with the prosecution against them. Under this circumstance, a fair trial was impossible.

12. Petitioners Were Deprived of a Fair Trial

In *Rochin* v. *California*, 342 U.S. 165 at 169, this Court defined its responsibility in criminal cases before it from the courts of the States.

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an

> exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' *Malinski* v. *New York*, *supra* (324 U.S. at 416, 417)."

Under *Lisenba* v. *California*, 314 U.S. 219, 236, a state is free to choose her own rules of evidence, but this freedom to erect her own structure of justice does not free that structure from the scrutiny of this Court in the area of due process.

Massey v. *Moore*, 348 U.S. 105, 108, states the effect of the Fourteenth Amendment on state criminal trials simply and concisely: "The requirement of the Fourteenth Amendment is for a fair trial." (citing *Betts* v. *Brady*, 316 U.S. 455).

This Fourteenth Amendment requirement has recently been brought directly to bear on Federal prosecutions by this Court's decision in *Elkins* v. *United States*, — U.S. —, 28 L.W. 4567, in which it was held that evidence obtained in violation of the Fourteenth Amendment by State officers is inadmissible in a Federal prosecution. In discussing the issue this Court stated at 4570:

> "If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of th Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. . . ."

Petitioners here have travelled a long and discouraging road in quest of a fair trial. They must find it here or nowhere. The Commonwealth of Pennsylvania has turned a deaf conscience toward them since its Governor used television to make political hay at the expense of petitioners' rights and freedom.

Petitioners contend that this Court may find a violation of the Fourteenth Amendment to the United States Constitution in any one of the many instances discussed in this petition.

But whether any one error violated the Amendment need not be decided. The "whole course of the proceedings" should be examined under the rule of the *Rochin* case. Such an examination must reveal beyond any doubt that petitioners have not been accorded a "faig trial."

Stated another way: the Questions Presented when taken together do so taint the proceedings in their cumulative effect as to constitute a denial of due process even though, when examined "standing alone", they may not in and of themselves require reversal.

We think this Court has already answered this question and therefore only recall the admonition in *Kotteakos* v. *United States*, 328 U.S 750, 765:[10]

> "If one cannot say with fair assurance after pondering all that happened without stripping the erroneous from the whole, the judgment was not substantially swayed by the error, it is impossible to concede that substantial rights were not effected."

[10] The fact that this is a Federal case does not detract from the efficacy of the admonition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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